Supreme Court of the United States

[illegible] Term, 1960

No. [illegible]

[illegible] B. ZAHNER,

Petitioner,

v.

[illegible] BENSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

KENYON B. ZAHNER,

Petitioner,

v.

EZRA TAFT BENSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A (R. 217).

The opinion of the District Court is not reported and is printed at Page 210 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered November 17, 1960 (R. 220). Order denying reconsideration was entered December 23, 1960 (R. 231). By orders of the

Court dated January 19, 1961 and February 17, 1961, the transmission of the opinion and judgment of the Court was stayed until March 13, 1961.

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED

Whether the decision of this Court in *Arant* vs. *Lane* 249 U.S. 367, 63 L. ed. 650 can be applied as an automatic rule of law to set aside finding of District Court that plaintiff was guilty of laches because of the mere passage of time following commencement of action where there was no showing of lack of diligence by plaintiff nor prejudice to defendants in the record and where defendants during trial remained silent as to any claim of laches occuring during the progress of the litigation.

RULES INVOLVED

The following are pertinent excerpts from the Rules of Civil Procedure for the United States District Courts:

> "52(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
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>
> "8(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy,

duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." * * * * *

STATEMENT

Plaintiff, a veteran civil service employee, filed an action on August 8, 1955, in the District Court for the District of Columbia joining the Secretary of Agriculture and the Civil Service Commissioners as defendants. Plaintiff prayed that the action separating him from his employment be declared unlawful under Section 12 of the Veterans Preference Act of 1944, 5 U.S.C.A. 861 and that he be restored to employment. When the action abated as to two of the four defendants, the District Court dismissed the original action with permission to file a new action. A new and identical cause of action was filed immediately on May 29, 1958.

The District Court found that defendants had acted unlawfully, that plaintiff was not guilty of laches and ordered judgment for plaintiff. The defendants appealed on the whole case. The Court of Appeals, on a record which was silent as to any facts to support the assumptions made, reversed for the sole reason of laches based on an assumed failure to prosecute diligently resulting in assumed prejudice to defendants.

A. The Facts.

The history of the litigation points up the absence of any facts before the Court of Appeals to support the assumptions which it made. The only facts disclosed in the record[1] were these:

1. Paragraph 20. of the Complaint (R. 9) which was not denied alleges that plaintiff exercised diligence in prosecut-

[1] The parties agreed upon and submitted a joint appendix to the Court of Appeals.

ing his claim and relates the commencement of the original action on August 8, 1955, the dismissal on May 16, 1958, without prejudice because of failure to substitute two of the Commissioners.

2. The filing of an identical complaint on May 29, 1958, within two weeks of the dismissal (R. 3).

3. The filing of the answer on August 1, 1958, (R. 1) in which only the bare allegation is made as the third defense, "Plaintiff is guilty of laches" (R. 14).

4. The trial of case on April 23, 24, 27, 1959. (R. 1).

5. The testimony of the plaintiff (R. 34-36).

6. The finding of the trial court which considered specifically the filing of the original action on August 8, 1955 (R. 214).

7. The conclusion that plaintiff was not guilty of laches (R. 214).

At the trial, defendants being unable to support the affirmative defense of laches, abandoned the defense. Paramount to an understanding of the facts relating to litigation of this case, is the undisputed fact that plaintiff at no time between the filing of the original action in August 1955 and the time judgment was entered ever asked for a postponement, or for more time or ever failed to appear or respond. While it is true that the plaintiff did not move to substitute newly appointed Commissioners within the six months period under this rule, the facts will show that this oversight was excusable and not prejudicial. Plaintiff discovered it promptly and immediately moved to dismiss without prejudice at a time when it was not even remotely possible that the case could be placed on the calendar for trial. The facts will also show that defendants opposed the motion and prevented substitution at that time.

The reason the record is devoid of any support of de-

fendants' affirmative allegation of laches is that the facts as known to the court and the defendants at the trial showed conclusively that plaintiff had acted diligently throughout and that the responsibility for any delay was chargeable either to defendants or to circumstances under the control of the Government. It was for this reason, as the facts will indicate, that defendants at trial abandoned the defense of laches. These are the facts as shown to the Court of Appeals (R. 221), and not controverted, as a basis for reconsideration:

At the time defendants' answer was filed October 8, 1955, it was estimated that the existing backlog in the District Court for civil non-jury cases, was approximately 22 months.

Under Rule 29 of the District Court for the District of Columbia, the responsibility for assigning veterans' cases for trial was under a Veterans Commissioner, a court officer. Although plaintiff, in January 1956, conferred with the Commissioner, no action was taken in that office because of an illness of the Commissioner which became progressively worse so that he finally ceased to function.

Judge Mathews of the District Court, on February 21, 1957, noticed the case for pre-trial hearing, but the District Attorney's Office had the case removed from pre-trial on the ground that it was a veteran's case and, hence, not subject to pre-trial procedure.

Plaintiff had, regularly after issue was joined, sought to meet with defendants' attorneys to facilitate a disposition of the case by agreeing upon the production of records in the possession of the defendants, but was unable to accomplish this objective because of the turnover of attorneys handling the case for defendants. At a time, in April 1957, when plaintiff expected an early trial, the attorney for defendants, who had become familiar with the file, was named

to the Municipal Court and the case reassigned. This was soon followed by Summer Court recess.

In October of 1957 upon reopening preliminary conferences with defendants' attorney, plaintiff discovered that two new Civil Service Commissioners had been appointed and that the six months period for substitution under Rule 25 (d) had expired on October 18, 1957. Plaintiff immediately on November 8, 1957, filed a motion to substitute under the rule in the *Acheson* cases[2] or in the alternative to dismiss without prejudice.

On November 14, 1957, the defendants moved for Summary Judgment or in the Alternative to Dismiss, the ground for dismissal being the lack of jurisdiction based on the failure to substitute under Rule 25 (d).

On November 19, 1957, defendants filed an opposition to plaintiff's motion stating:

> "There is manifestly no need to dismiss this suit without prejudice. Should this Court deny plaintiff's motion to substitute new civil service commissioners, the action against Benson would still remain and this Court could proceed to act on the defendants' motion for Summary Judgment."

On December 6, 1957, appellee filed a counter motion for Summary Judgment.

All of the above motions were heard on December 16, 1957, and the Court denied defendants' motion for Summary Judgment, or in the Alternative to Dismiss. The Court at the same time denied plaintiff's motion to substitute and permitted plaintiff to withdraw his motion to dismiss without prejudice for the reason that the Court had denied defendants' motion to dismiss for failure to substitute.

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[2] *Acheson v. Furusho*, 212 F. 2d 284; *Lehmann v. Acheson*, 214 F. 2d 403; *Tom Wing Po v. Acheson*, 214 F. 2d 661; *Chew Yin v. Acheson*, 216 F. 2d 60.

On February 10, 1958, a Stipulation was filed to amend the complaint, adding the allegation that defendants failed to comply with Department regulations on the basis of the Supreme Court's decision on October 1957 in *Watson* v. *U. S.*, 355 U.S. 23.

On February 13, 1958, defendants filed answer to the amendment realleging their defenses and adding the new ground of lack of jurisdiction because of the failure to substitute.

On February 18, 1958, the Court entered a pre-trial order approving statements submitted by the parties including the defendants' new defense of lack of jurisdiction based on the failure to substitute. Thereafter, the case was for the first time placed on the daily trial calendar.

On May 16, 1958, defendants moved to dismiss without prejudice for the reason that the new Commissioners were indispensable parties. The plaintiff argued that the Court could substitute under the holdings in the *Acheson* cases or that defendants could be added under Rule 21 and, that in any event a mandatory order could be issued against the defendant Benson. The defendants' motion was granted and plaintiff's motion to substitute or add denied, the court stating:

> "Again, I see no great prejudice by this court in any way, because if estoppel would operate as against the new action, it seems to me that it would have operated against the present action, providing the plaintiff proceeds with diligence to file a new action. And if laches would not operate against the present action, it does seem to me that it should not operate against the new action." * * * (Transcript May 16, 1958)

On May 20, 1958, the order dismissing without prejudice was filed.

Plaintiff filed an identical action on May 29, 1958, with the exception that he alleged also the facts with relation

to the filing of the original suit and the dismissal without prejudice.

The government attorney agreed to expedite but, the case was again reassigned because of the promotion of the defendants' attorney to Chief of the Division. Consequently, the answer was not filed until August 1, 1958. The case was pretried in December 1958, placed on the daily calendar and was called and tried on April 23, 24, and 27, 1959.

On November 1958, the Court of Appeals for the District of Columbia, for the first time where the issue was squarely presented, held that all of the Civil Service Commissioners were necessary parties even though the agency head, who was the only one who could carry out the mandatory order, remained as a defendant. (*Hicks* v. *Summerfield*, 261 F. 2d 752, 104 App D.C. 266, cert. den., 79 S. Ct. 798)

The history of this case set forth above was well known to the Court when the case went to trial on April 23, 1959 (the jacket files of both cases were before the Court (R. 2, 46, 63)). For this reason, the defendants did not offer evidence, motion or argument that plaintiff had not acted diligently during the progress of the case prior to trial, nor was there any evidence of prejudice although if such prejudice existed it would have been in the possession of Davis, Assistant Personnel Director of the Farmers Home Administration who appeared as a witness for defendants. (Laches is not even mentioned in the written argument submitted in lieu of oral argument at the close of the case.)

The District Court found that the action of the defendants was unlawful, that plaintiff was not guilty of laches and ordered judgment for plaintiff. The Court of Appeals reversed basing its decision on the assumption that plaintiff had not diligently prosecuted his case after filing. Plaintiff's petition for rehearing or for a remand was denied.

REASONS FOR GRANTING THE WRIT

The per curiam decision below warrants review and requires reversal by this Court because it misapplies a decision of this Court so as to establish a precedent which seriously jeopardizes the rights of Federal employees to secure court relief from unlawful personnel action. The District Court of the District of Columbia is the only court in which employees' suits may be brought in order to obtain jurisdiction of the agency heads and Civil Service Commissioners, and thus this case has a broad impact, imposing as it does another and uncalled for barrier to the already difficult task of federal employees everywhere of obtaining court redress for improper discharges such as found to have taken place here.

Federal employees may now only in rare instances obtain relief from unlawful personnel actions. The courts have determined that the scope of review is very narrow and have strictly construed this limitation as well as the requirements that employees exercise due diligence in commencing their action and that they must exhaust their administrative remedy. The Court of Appeals would now add to the existing burdens a new and strange rule. In essence, they have determined that an employee plaintiff who is properly in court with issue joined must in addition be solely responsible for all of the various causes and circumstances outside of his control which determine the rate of progress of a case through the trial court. As this Court is well aware, delays in the processing of a case after its filing are the common lot of most litigants in this Circuit; all future federal employee litigants will risk ultimate dismissal of their actions if the rule announced by the Court below is to prevail.

The Court of Appeals set aside the "no laches" finding of the District Court on the sole authority of *Arant* v. *Lane* 249 U.S. 367, 63 L. ed. 650, giving to that opinion of this

Court a construction which permitted the Court of Appeals to (a) ignore Rule 52 (a) of the Rules of Civil Procedure; (b) relieve defendants of the burden of providing their affirmative defense; (c) go outside of the record and make assumptions without basis in fact.

The Court of Appeals in its per curiam opinion has stretched this Court's opinion in *Arant* beyond all limits of reasonable interpretation; the case has no application to the situation here. In *Arant*, this Court decided that a delay of twenty-two months in *commencing suit* constituted laches. The case was determined on plaintiff's demurrer to the answer which had set forth specific details spelling out the prejudice suffered by the Government because of plaintiff's delay in commencing his suit. The situation presented here is entirely different. Unlike *Arant*, the plaintiff is suing to enforce rights granted to him by Congress and unlike *Arant*, plaintiff appealed immediately and filed his action promptly. It is conceded by the Court of Appeals that the District Court was correct in holding that plaintiff was duly diligent in filing his action and the Government at no time showed prejudice or seriously pressed a claim of laches arising out of subsequent delays which were no fault of the plaintiff.

The case came to the Court as one which had been carefully pleaded and then thoroughly tried and considered.[1] During the trial plaintiff testified as to the circumstances existing prior to suit but although the Government's witness and the Government's attorneys would have been in possession of any facts bearing on delay or prejudice suffered by defendant after the Court had acquired jurisdiction, no evidence of delay or prejudice was presented nor was any claim, argument or motion made relating to laches

[1] As to the merits it is difficult to find a situation where an employee's rights have been so flagrantly abused—a fact reflected in the confidential communication between defendants (R. 92).

for the period after suit was commenced; the District Court having the files in both cases before them, noted specifically the filing date of the original case, August 8, 1955, and found the plaintiff not guilty of laches. Consequently, the issue here is whether a circuit court, faced with a record barren of any proof of laches, could, nevertheless, construct for the period following the commencement of litigation not only inequitable delay, chargeable to plaintiff, but prejudice to the Government by applying *Arant* v. *Lane* as a fixed rule of law requiring that construction.

The error of the Court's decision in so doing is apparent because, once the action was commenced, the defendants were put on notice of plaintiff's claim.[2] They could easily have avoided responsibility for their unlawful action by immediately restoring the plaintiff. Having chosen not to do this and to contest the legality of their action, and having participated step by step through the course of the litigation, and having caused or contributed to the various circumstances which prevented an early trial, and having acquiesced in the filing of a new action by moving to dismiss without prejudice, and having not objected until the appellate court was reached, they cannot point to *Arant* v. *Lane* to establish that prejudice resulted from plaintiff's conduct when at the trial they failed entirely to show or even assert either delay or prejudice.

Arant v. *Lane* was never intended to be a substitute for evidence not produced but necessary to support an affirmative defense and which was within the knowledge and possession of the defendants if, in fact, any evidence existed, nor was *Arant* v. *Lane* intended as a basis for an automatic overruling of a District Court's findings after

[2] Of course, Chairman Young's "personal" letter to Secretary Benson reveals guilty knowledge even at the time of the final decision of the Commission (R. 92).

trial. Furthermore, there was no delay of an inequitable nature. Once the Complaint and Answer were filed and issue joined the case was under the supervision of the District Court. The District Court having affirmatively found that laches did not exist, the Appellate Court cannot on basis of *Arant* assume that inequitable delay existed in the District Court and that it was the result of a lack of diligence on the part of the plaintiff. The problem presented to this Court in *Arant* v. *Lane* is not the problem presented in this case.

Not only is *Arant* v. *Lane* distinguishable on its circumstances but the interpretation given to it if not corrected will upset hitherto well-settled rules of orderly procedure in the trial and review of cases.

The provision of Rule 52 (a) of the Federal Rules of Civil Procedure that prohibits the setting aside of a finding by the District Court, unless it is *clearly erroneous*, is merely a restatement of a well-settled limitation on the scope of review. It has long been the position of this Court that a finding by the trial court that a plaintiff is not guilty of laches will not be disturbed, *Southern Pacific Co.* v. *Bogart*, 250 U.S. 493, 489, 490, 63 L. ed. 1099, 1107; *West* v. *American Telegraph & Telephone Company*, 311 U.S. 223, 240, 241, 85 L. ed. 139, 146.

While the Court below has frequently stated it will "scrupulously" confine itself to the record (*Washington Ry. & Electric Co.* v. *Stuart*, 267 F. 632), and has refused to "draw conclusions by speculation where the data necessary for certainty was not given in the Trial Court" (*Riley* v. *Titus*, 109 F. 2d 653) and has affirmed the principle that laches must be pleaded and proved (*Callaway* v. *Hamilton Bank*, 195 F. 2d 556), nevertheless its decision in this case would ignore the rule of this Court and the foregoing principles under the cloak of *Arant* v. *Lane*.

Furthermore, the Court of Appeals would by its erroneous application of *Arant* v. *Lane* overrule the holding of this Court in such cases as *Holmberg* v. *Armbrecht*, 250 U.S. 327, 392, 396, 90 L. ed. 743, 747, that time alone does not constitute laches but that delay must not only be delay in the equitable sense of lack of diligence, chargeable to plaintiff, but must result in "*some change in the conditions or relations of the property or the parties*" (p. 396). The Court accomplishes this strange result in this manner—it lifts one sentence out of context and applies it to the assumed facts in this case. The sentence quoted by the Court of Appeals is limited by the statement of fact contained in the sentence which precedes it. The entire reference reads:

> "Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached, and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy". [249 U.S. 372]

The error is apparent for plaintiff was in court and the court had jurisdiction of the matter, and it was for the defendant to show to the court that plaintiff was obstructing the progress of the case and that defendants because of this had changed their position to their damage.[1] There is a vast difference between delay prior to suit where only plaintiff knows the reasons and must justify his action

[1] The testimony of plaintiff shows continuous employment beginning at the time of the filing of the original action so that the accumulation of any unearned salary for the period covered by litigation is entirely speculative (R. 34-37).

and delay after filing which would be within the knowledge of defendants and apparent on the court records.

This Court has had occasion in recent years to consider the effect of abatement, dismissal and the commencement of a new suit and has held that laches do not exist where "there is no showing that respondent's position has suffered from the fact that the claim has not yet proceeded to trial on its merits", *Gardner* v. *Panama Railroad*, 342 U.S. 29, 31, 96 L. ed. 31, 36. In *Gardner* v. *Panama*, the plaintiff's first suit was dismissed on jurisdictional grounds and his second suit was dismissed for abatement. Gardner thereupon filed a third action. The five days between dismissal and the commencement of the new action in the Gardner case are to be compared with nine days in the present case. The language of this Court in *Gardner* v. *Panama* in rejecting mechanical guides to determine laches is controlling here:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. . . .
>
> "Petitioner has diligently sought redress in this case. Twice within the year following her injuries she brought suit. The second action abated through An Act of Congress and not through any fault of her own. There is no showing that respondent's position has suffered from the fact that the claim has not yet proceeded to trial on its merits".

Finally, even assuming the Court below could properly assume that the District Court was not fully informed as to the facts relating to the rate of progress of the litigation, it was, nevertheless, required to apply the rule of *Czaplicki*

v. *SS "Hoegh Silver Cloud"*, 351 U.S. 525,100 L. ed. 1387 which precludes a Court of Appeals from finding laches where the record is barren of any facts to support laches.

CONCLUSION

It is respectfully submitted that the errors of the Court below are so manifest and the impact on the courses of future litigation involving the employment rights of federal workers so prejudicial as to require review by this honorable Court.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15633

EZRA TAFT BENSON,
Secretary of Agriculture, et al., APPELLANTS

v.

KENYON B. ZAHNER, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 17, 1960

Mr. John G. Laughlin, Jr., Attorney, Department of Justice, for appellants. *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney, *Alan S. Rosenthal* and *Marvin S. Shapiro*, Attorneys, Department of Justice, were on the brief, for appellants.

Mr. Donald M. Murtha, with whom *Mr. Herbert S. Thatcher* was on the brief, for appellee.

Before PRETTYMAN, EDGERTON and BAZELON, Circuit Judges.

PER CURIAM: As a result of a reduction in force in an office in the Farmers Home Administration, appellee's appointment was terminated. His claim that he was entitled to re-assignment as a veterans preference eligi-

ble[1] was denied by the Civil Service Commission. He pursued his administrative remedies and exhausted them on August 4, 1954. Approximately one year later, on August 8, 1955, appellee filed suit in the District Court seeking reinstatement. This action was dismissed without prejudice on May 16, 1958, because appellee failed to substitute newly appointed members of the Civil Service Commission as parties defendant within the six-month period required under Rule 25(d), FED.R.CIV.P. Appellee filed the instant action on May 29, 1958, stating the same claim as in the earlier suit. Appellants raise the defense of laches in their answer, as well as denying that appellee had been improperly denied reinstatement. On November 10, 1959, the District Court entered judgment for appellee and ordered his reinstatement.

The judgment of the District Court must be reversed because appellee is guilty of laches. One year elapsed between the final administrative action and the institution of the first suit. An additional period of almost three years passed before that suit was dismissed. Then almost another year elapsed between the institution and trial of the present suit. Absent any evidence to the contrary, appellee's failure to obtain a substitution of parties in the first suit must be attributed to his lack of diligence.[2] This inaction brought about the additional pre-trial delay necessitated by the second suit. We think

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[1] Veterans' Preference Act § 12, 58, Stat. 390. (1944), as amended, 5 U.S.C. § 861 (1958).

[2] We are not dealing here with a case where delay is caused by a reasonable mistake as to an unsettled matter of law. In such cases the delay is not attributable to lack of diligence. See *Ritter* v. *Strauss*, 104 U.S.App.D.C. 301, 261, F.2d 767 (1958). An example of this type of case would be one in which the plaintiff, due to an uncertainty in the law, brought suit against the wrong governmental officer. Cf. *Williams* v. *Fanning*, 332 U.S. 490 (1947).

that, when this delay is added to the appellee's initial delay of one year before bringing any suit after final agency action, the cumulative effect must be viewed as prejudicial to the Government. As the Supreme Court stated in *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372 (1919):[3]

> Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that when unexplained, the manifest inequity which would result from reinstating him renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

Reversed.

[3] Accord: *Drown* v. *Higley*, 100 U.S.App.D.C. 326, 224 F.2d 774 (1957); *Grasse* v. *Synder*, 89 U.S.App.D.C. 352, 192 F.2d 35 (1951); *Caswell* v. *Morgenthau*, 69 App.D.C. 15, 98 F.2d 296, *cert. denied*, 305 U.S. 596 (1938).